THE STATE AS DEFENDANT UNDER THE FEDERAL CONSTITUTION; THE VIRGINIA-WEST VIRGINIA DEBT CONTROVERSY

JURISDICTION

THE Constitution of the United States provides that "the judicial power shall extend . . . to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; . . . and between a State, or the citizens thereof, and foreign States, citizens or subjects."

"In all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction." [1] By the Judiciary Act of 1789 [2] the original jurisdiction of the Supreme Court over all controversies of a civil nature between two or more States was declared to be exclusive.

I. A SOVEREIGN STATE MAY NOT BE SUED WITHOUT ITS CONSENT

That a sovereign State is not subject to suit without its consent is a principle unchallenged since the time of Rome. It finds its expression in the rule that the sovereign can do no wrong, and has been embodied in the English Common Law even more fully than in the civil law. The principle is so fundamental and elementary that it does not require analytical criticism here.[3]

II. SUITS AGAINST STATES

(*a*) THE CONSTITUTIONAL CONVENTION

The Articles of Confederation gave Congress power over State controversies concerning "boundary, jurisdiction or any other

[1] Art. III, sec. 2, pars. 1 and 2.

[2] Act of Sept. 24, 1789, chap. 20, 1 STAT. L. 80.

[3] 2 LOCKE, GOVERNMENT, § 205; PUFFENDORF'S LAW OF NATURE AND NATIONS, Bk. 8, ch. 10; Vattel, Bk. 1, ch. 4, §§ 49, 50; STORY'S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1675.

cause whatever," and made that body the Court of last resort. Procedure was provided for settlement of such disputes through the appointment of a joint commission by the contending States, or should they fail to agree, then by Congress itself from among the States. Should a State fail to appear, the proceedings could be conducted *ex parte*.[4] During the Colonial period the disputes between the Colonies, especially those in relation to boundaries, had been determined by the English Courts, as for example, Mason and Dixon's line.[5] Other disputes were settled by the Privy Council, for example, between Massachusetts and New Hampshire and New York in 1764.

Under the power thus granted apparently only three Inter-Colonial disputes were heard — one between Massachusetts and New York in 1784–86,[6] and one between South Carolina and Georgia in 1785–86,[7] both of which were settled by compromise out of Court. A third, between Pennsylvania and Connecticut in 1782, resulted in the turning over to Pennsylvania of the Wyoming region.[8]

But the mode of settlement provided by the Articles of Confederation was cumbersome and ineffective. On the adoption of the Constitution there were existing controversies between eleven States over boundaries which had arisen under their respective charters, and had continued since the first settlement of the Colonies.[9]

We find no inclusion, in the various drafts of the Article on the Judiciary, throughout the early part of the Federal Convention, of any specific reference to suits between States or between States and their own citizens, or citizens of other States, domestic or foreign. Even after the matter had reached the Committee on Detail, the clause covering the National Judiciary's jurisdiction continued to be defined in the following terms:

"The jurisdiction of the National Judiciary shall extend to cases arising under the laws passed by the General Legislature, and to such other questions as involve the National Peace and harmony." [10]

[4] Art. IX.

[5] Penn. *v.* Baltimore, 1 Vesey, 44.

[6] JOURNALS OF CONGRESS, IV, 444–53, 536, 564, 592–94, 787.

[7] *Ibid.*, IV, 529, 530, 634, 644, 691–97.

[8] *Ibid.*, IV, 129–40. See also ESSAYS IN CONSTITUTIONAL HISTORY OF THE UNITED STATES, edited by J. F. Jameson, ch. 1.

[9] Rhode Island *v.* Massachusetts, 12 Pet. 657 (1838).

[10] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, 132, 133.

In a document found among the Mason papers, we see for the first time a change to language in any way approaching the final draft as it stands in the Constitution. This change read:

"The jurisdiction of the Supreme Tribunal shall extend:

1. To all cases arising under laws passed by the General (Legislature).

2. To impeachments of officers, and

3. To *such* other cases as the National Legislature may assign, as involving the national peace and harmony, in the collection of the revenue, in disputes between citizens of different States; [in disputes between a State and a citizen or citizens of another State]; in disputes between different States, and in disputes in which subjects or citizens of other countries are concerned, [and in cases of admiralty juris'n"].

The paper is in the handwriting of Edmund Randolph; certain italics represent changes made in his writing, and the emendations in John Rutledge's handwriting are enclosed in brackets. It is interesting to note that the emendation relative to disputes between a State and a citizen or citizens of another State was made merely in the margin.[11]

Among the Wilson papers we find a very elaborate scheme for giving the Senate jurisdiction in disputes between States over jurisdiction of territory, with emendations by Rutledge.[12]

Finally, in these same papers, we find the provision thus framed:

"The jurisdiction of the Supreme (National) Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors (and other) [other] public ministers [and Consuls]; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between [States, except those wh' regard jurisd'n or territory — betw'n] a State and a citizen or citizens of another State, between citizens of different States and between [a State or the] citizens (of any of the States) [thereof] and foreign States, citizens or subjects." [13]

In the next document from the Committee on Detail, we find the clause reading thus:

"The jurisdiction of the Supreme Court shall extend to all cases arising under the laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other public ministers and consuls; to the trial of impeachments of officers of the United States; to all cases

[11] 2 FARRAND, 146, 147. [12] *Ibid.*, 170, 171. [13] *Ibid.*, 172, 173.

of admiralty and maritime jurisdiction; to controversies between two or more States (except such as shall regard territory or jurisdiction) between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof and foreign States, citizens or subjects." [14]

This is from the Journal of Madison of August 6, 1787.

In the Journal of Monday, August 20, 1787, we find the following proposition was referred to the Committee on Detail:

"The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual State, or the United States and a citizen of an individual State." [15]

In the Journal for Wednesday, August 22, 1787, we find this entry:

"The Committee report that in their opinion the following additions should be made to the report now before the Convention; namely . . . between the fourth and fifth lines of the third section of the eleventh article, after the word 'controversies' insert 'between the United States and an individual State' or 'the United States and an individual person.'" [16]

It was moved, seconded and agreed to delay consideration of this recommendation along with other recommendations of the Committee until copies of the Committee's report could be had by the various members of the Convention.[17]

Finally, in the Journal of Friday, August 24, 1787, by vote of eight to two, we find struck out the provisions giving the Senate jurisdiction over disputes between States and over land questions, which had been modelled on procedure in the Articles of Confederation, because as Mr. Wilson said, it "will be rendered unnecessary by the National Judiciary now to be established." [18]

On Monday, August 27, 1787, we find Madison and Gouverneur Morris moving to insert after the word "controversies" the

[14] 2 FARRAND, 186.

[15] *Ibid.*, 335, 340–42.

[16] *Ibid.*, 366, 367. The formal Journal of the Convention here quoted from is based upon the minutes of the Secretary of the Convention, William Jackson, and in addition to this, Madison, regarded by his fellow delegates as a semi-official reporter, kept his own notes of the proceedings.

[17] *Ibid.*, 368.

[18] *Ibid.*, 400, 401.

words, "to which the United States shall be a party," which was agreed to without debate. Dr. Johnson then moved to insert the words "this Constitution and the," before the word "laws," but Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judicial nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department, he argued, but the motion of Dr. Johnson was agreed to without debate, because, as Madison's Journal shows, it was generally supposed that the jurisdiction given was constructively limited to the cases of a judicial nature.

On motion of Rutledge the words, "passed by the Legislature" were struck out and after the words "United States" there were inserted, without debate, the words, "and treaties made or which shall be made under their authority," conformably to the preceding amendment in another place.

Madison and Gouverneur Morris moved to strike out the words, "the jurisdiction of the Supreme Court," and to insert the words, "judicial power," which was agreed to without debate.

Upon Mr. Sherman's motion, after the words, "between citizens of different States," there were inserted the words, "between citizens of the same State claiming lands under grants of different States," similar to the provision in the ninth Article of the Articles of Confederation, which was agreed to without debate.[19]

The next record of proceedings of the Convention shows that Section 2 of Article III came from the Committee on Style, substantially in its final form, with the vital exception that the jurisdiction "over controversies between two or more States" still excepted "such as shall regard territory and jurisdiction." [20]

In the later report of the Committee (September 12) this exception is struck out. No debate is recorded upon it.[21]

The Journal does not record further action taken on this Section, except for September 15, 1787, when it is shown that it was voted to strike out the word "both" in the first line before the phrase, "in law and equity." [22]

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[19] 2 FARRAND, 430–32. See also pp. 423–25.

[20] *Ibid.*, 576.

[21] *Ibid.*, 600.

[22] *Ibid.*, 621.

With particular reference to the history of the development of the second paragraph of Section 2 of Article III of the Constitution, in so far as it concerns our present discussion, namely, the original jurisdiction of the Supreme Court when a State is a party, it is interesting to note specially the trend that the Federal Convention took. For Tuesday, May 29, 1787, we find in the Paterson Records that among Governor Randolph's recommendations was "a nat'l judiciary to be elected by the Nat'l Legr. — To consist of an inferior and superior tribunal — To determinate piracies, captures, disputes between foreigners and citizens, and the citizen of one State and that of another, revenue-matters, national officers." [23]

But, it is to be noted that at this time there was no mention of suits by or between States.

In the next reference to this phase of the judicial power, we find, similarly, no mention of suits by or between States.[24]

Then, when the Report came from the Committee on Detail, we find this language:

"The jurisdiction of the Supreme Tribunal shall extend, . . . (3) to *such* other cases as the National Legislature may assign, as involving the national peace and harmony . . . , [in disputes between a State and a citizen or citizens of another State] in disputes between different States . . . but this supreme jurisdiction shall be appellate only, except in [cases of impeachm't, and (in)] those instances, in which the Legislature shall make it original, and the Legislature shall organize it." [25]

The New Jersey plan does not appear to have dealt with the question of the State as a party.[26] But in the Report of the Committee on Detail, we find this:

"In cases of impeachment, (those) [cases] affecting Ambassadors (and) other public ministers [and Consuls], and those in which a State shall be (one of the) [a] part(ies) [y] this jurisdiction shall be original."[27]

Similarly, in Madison's Journal of Monday, August 6, we find the above emendations adopted in the Report of the Committee on Detail, which Rutledge delivered to the Convention.[28]

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[23] 1 FARRAND, 28.

[24] Madison's Journal, 1 FARRAND, 244. See also the Record of Rufus King, 1 FARRAND, 247; Madison's later Record of June 18, 1787, 1 FARRAND, 292.

[25] 2 FARRAND, 146, 147.

[26] *Ibid.*, 157. [27] *Ibid.*, 173. [28] *Ibid.*, 186.

Then on August 27 it was voted to strike out the words, "this jurisdiction shall be original," and to insert the words, "the Supreme Court shall have original jurisdiction." [29] And so it remained in the Report of the Committee on Style, and was embodied in the Constitution as finally adopted.[30]

(*b*) The State Conventions

Since the suability of a State without its consent was a thing unknown to the law, its cognizance was not contemplated by those who wrote into the Constitution the clauses conferring jurisdiction upon the Federal Judiciary, the course of which has just been traced through the entire debates in the Federal Convention. And when there arose the matter of presentation of the new Constitution to the various States for adoption by them, we find precisely the same views entertained. When it was argued by George Mason and Patrick Henry and others that the clause authorized jurisdiction to be given to the Federal Courts to entertain suits against a State brought by the citizens of another State, or of a foreign State, Madison replied:

"It is not in the power of individuals to call any State into Court. The only operation it can have, is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court. This will give satisfaction to individuals, as it will prevent citizens, on whom a State may have a claim, being dissatisfied with the State Courts. It is a case which cannot often happen, and if it should be found improper, it will be altered. But it may be attended with good effect." [31]

Likewise Marshall in answer to the same objection said:

"With respect to disputes between *a State and the citizens of another State*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the Bar of the Federal Court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose that the sovereign power should be dragged before a Court. The intent is to enable States to recover claims of individuals residing in other States. . . . But, say they, there will be partiality in it, if a State cannot be defendant — if an individual

[29] 2 Farrand, 425.

[30] *Ibid.*, 601.

[31] 3 Elliot, Debates on the Federal Constitution, 2 ed., 533.

cannot proceed to obtain judgment against a State, although he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular State, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a State recover any claim from a citizen of another State, without the establishment of these tribunals?" [32]

Similarly, Alexander Hamilton in "The Federalist," replying directly to the suggestion that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the Federal Courts for the amount of those securities, said:

"It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the Federal Courts by mere implication and in destruction of a pre-existing right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." [33]

(*c*) The Decisions

1. *Suits by Citizens of Other States*

The views of the framers of our Constitution did not long prevail, however. Almost immediately the Supreme Court faced the question of a State's suability in the case of *Chisholm* v. *Georgia.*[34] The sole question there presented was whether, considering the general political doctrines prevailing at the time of the adoption of the Constitution, the framers of that instrument could properly be held to have intended by the use of the words "between a State and citizens of another State," that this derogation from the

[32] 3 Elliot, Debates on the Federal Constitution, 2 ed., 555–56.

[33] The Federalist, No. 81.

[34] 2 Dall. 419.

sovereignty of the States should exist. A majority of the Court said yes, but Justice Iredell dissented, arguing that, under the Constitution, the Federal Courts could take jurisdiction only in those cases in which a State, according to generally accepted principles of law, could be properly made a party; namely, where it appeared as plaintiff or consented to appear as defendant.

In the case of *Georgia* v. *Brailsford*,[35] it had already been held that a State might appear as party plaintiff in a suit against a citizen of another State, but *Chisholm* v. *Georgia* aroused such wide-spread disapproval that the Eleventh Amendment to the Federal Constitution was promptly adopted. It expressed the will of ultimate sovereignty of the whole country, superior to all legislatures and courts, and reversed the decision of the Supreme Court. It recites that "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State," and although not in terms prohibiting suits by individuals against the States, but merely declaring that the Constitution shall not be construed to import any power to authorize the bringing of such suits, it was held that the effect of the amendment was to supercede all suits pending as well as to prevent the institution of new suits against any State, by citizens of another State.[36]

2. *Suits by a State's Own Citizens*

But even with the Eleventh Amendment, it will be seen that there is nowhere in the Constitution a declaration that either the United States or one of the States may not be sued by a citizen of the United States or by one of its own citizens, respectively. However, this point was removed from all further controversy by the decision of *Hans* v. *Louisiana*,[37] which was a suit against the State of Louisiana by one of its own citizens in which the Court, speaking through Justice Bradley, went out of its way to expressly repudiate the decision in *Chisholm* v. *Georgia*, in spite of the fact, as we have seen, that that decision had been annulled by constitutional amendment. It had already been explained by Chief Justice

[35] 2 Dall. 402.

[36] Hollingsworth *v.* Virginia, 3 Dall. 378.

[37] 134 U. S. 1.

Marshall in *Cohens* v. *Virginia*,[38] that making a State a defendant in error was entirely different from suing a State in an original action, in prosecution of a demand against it, and was not within the meaning of the Eleventh Amendment; that the prosecution of a writ of error against a State was not the prosecution of a suit in the sense of that amendment, which had reference to the prosecution by suit of claims against a State.

3. *Suits between States*

Controversies between States are on a different footing from disputes between independent nations. None are determinable by war, nor even by diplomatic intercourse in the ordinary sense, though, with the assent of Congress some of them may be susceptible of settlement by interstate compact.[39] All that are of a justiciable nature may be determined by the Supreme Court at the suit of one of the parties. The Articles of Confederation, as we have seen, provided for the creation of a special commission to determine State controversies, upon the presentation to Congress of a petition by one of the parties. Eight petitions were thus presented, each involving claims to territory. But commissions were actually appointed in but two cases, and only one of these was adjudicated — the dispute between Pennsylvania and Connecticut over the Wyoming lands, where judgment was given for Pennsylvania.

In order to bring an interstate case within the competency of the Court two conditions are requisite: First, there must be a real collision between States — that is, it must appear that the States are in direct antagonism as States, and second, the controversy must be justiciable.

In *New Hampshire* v. *Louisiana*,[40] the Supreme Court refused to countenance the attempt of citizens to evade the operation of the Eleventh Amendment by transferring their pecuniary claims to another State and having that State bring suit in their behalf, finding that in fact the original owners of the bonds and coupons in question still remained the real parties in interest though not the nominal parties of record, and that, therefore, the suit was not a *bona fide* one between two States. But later the Court held

[38] 6 Wheat. 264. [39] Art. I, sec. 10, par. 2. [40] 108 U. S. 76.

otherwise in *South Dakota* v. *North Carolina*, 192 U. S. 286, where it was decided that the complaining State was the real owner of the bonds, and not merely an agent for private bondholders. This case will be considered later.

But the mere fact that a State is actually the plaintiff is not a conclusive test that the controversy is one in which the Court will always grant relief against another State or her citizens. Therefore, the question as to the character of interests requisite for the institution and maintenance of suits against a State, whether brought by another State, the United States itself, or by a foreign State, must be considered. In short, the question still to be determined is this: "What controversies are justiciable?" And at the very outset it may be stated as a general rule that Federal jurisdiction of suits brought by a State against individuals is thus distinguished from the jurisdiction of interstate suits: In the first case, the Constitution opens a better court for the determination of causes already justiciable; in the other, it opens a court for the determination of causes not otherwise regularly justiciable at all.

(*a*) Boundary Disputes

Boundary disputes became the first important class to be adjudicated, because, as we have seen, the procedure under the Articles of Confederation for the settlement of such disputes was cumbersome and ineffectual, with the result that when the Constitution was adopted there were pending eleven such controversies, dating back to the first settlement of the Colonies.

The first case was *New Jersey* v. *New York*,[41] decided in 1831. As authority additional to the express provision of the Constitution for its exercise of original jurisdiction in suits against a State, Chief Justice Marshall relied upon the earlier decisions including *Chisholm* v. *Georgia*, which the Eleventh Amendment annulled, and further observed, confirming prior decisions, that should a defendant State after due service of process fail to appear, the complaining State had a right to proceed *ex parte* to a final judgment.

The second case was between Rhode Island and Massachusetts,[42] decided in 1838. Daniel Webster was counsel for Massachusetts

[41] 5 Pet. 284.

[42] 12 Pet. 657.

and argued that the Court had no jurisdiction. He maintained that the jurisdiction of suits between States extended only to matters ordinarily judicially cognizable, and not to suits of a political character, such as was a suit regarding boundaries. But the Court held otherwise, in an elaborate and extremely learned, forceful opinion by Justice Baldwin. He said:

"We must presume that Congress did not mean to exclude from our jurisdiction those controversies, the decision of which the States had confided to the judicial power, and are bound to give to the Constitution and laws such a meaning as will make them harmonize, unless there is an apparent or fairly to be implied conflict between their respective provisions. In the construction of the Constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted, 12 Wheaton, 354; 6 Wheaton, 416; 4 Peters, 431–32; to ascertain the old law, the mischief and the remedy." [43]

The Court then reviewed the history of State controversies over boundaries, and continued:

"With the full knowledge that there were at its adoption, not only existing controversies between two States singly, but between one State and two others, we find the words of the Constitution applicable to this state of things, 'controversies between two or more States.' It is not known that there were any such controversies then existing, other than those which related to boundary; and it would be a most forced construction to hold that these were excluded from judicial cognizance, and that it was to be confined to controversies to arise prospectively on other subjects. . . .

"There can be but two tribunals under the Constitution who can act on the boundaries of States, the legislative or the judicial power; the former is limited in express terms to assent or dissent, where a compact or agreement is referred to them by the States; and as the latter can be exercised only by this Court, when a State is a party, the power is here or it cannot exist. . . . That the Constitution which emanated directly from the people, in conventions in the several States, could not have been intended to give to the judicial power a less extended jurisdiction, or less efficient means of final action, than the articles of Confederation adopted by the mere legislative power of the States, had given to a special tribunal appointed by Congress, whose members were the mere creatures and representatives of State legislatures, appointed by them, without any action by the people of the State." [44]

[43] 12 Pet. 723.

[44] 12 Pet. 724–28.

As to the Court's ability to enforce its decree Justice Baldwin said:

"This Court cannot presume, that any State which holds prerogative rights for the good of its citizens and by the Constitution has agreed that those of any other State shall enjoy rights, privileges and immunities in each, as its own do, would either do wrong, or deny right to a sister State or its citizens, or refuse to submit to those decrees of this Court, rendered pursuant to its own delegated authority; when in a monarchy its fundamental law declares that such decree executes itself. . . . In the case of Olmstead the Court expressed its opinion that if State legislatures may annul the judgments of the Courts of the United States, and the rights thereby acquired, the Constitution becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by its own tribunal. So fatal a result must be appreciated by all; and the people of every State must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves. 5 Peters, 115, 135." [45]

Chief Justice Taney dissented in a weak opinion on the ground that not property rights, but sovereignty and jurisdiction — political rights — were the sole subject of controversy, and such not the subjects of judicial cognizance and control under the Constitution.

Subsequently, Mr. Webster, on behalf of Massachusetts, moved to withdraw the appearance of that State on the theory that jurisdiction had been assumed only because Massachusetts had appeared. But the Court decided otherwise, stating, however, that no coercive measures would be taken to compel appearance, but that complainant might proceed *ex parte*.[46] Thereupon Massachusetts elected not to withdraw her appearance, and the case proceeded upon amended pleadings, and the Court held that the rules and practice of a Court of Chancery should govern in conducting the suit to a final issue, moulded, however, on liberal principles befitting the controversy between two sovereign States.[47]

Similarly in a large number of later cases the same jurisdiction was consistently upheld.[48]

[45] 12 Pet. 751.

[46] *Ibid.*, 755.

[47] 14 Pet. 210.

[48] Missouri *v.* Iowa, 7 How. 660; Florida *v.* Georgia, 11 How. 293; *Ibid.*, 17 How. 478; Alabama *v.* Georgia, 23 How. 505; Virginia *v.* West Virginia, 11 Wall. 39; South Carolina *v.* Georgia, 93 U. S. 4; Indiana *v.* Kentucky, 136 U. S. 479; Nebraska *v.* Iowa, 143

(*b*) Other Disputes

But this jurisdiction has not been carried to the extent of covering maladministration of laws of one State to the injury of citizens of another.[49]

However, under certain circumstances, a State can invoke the original jurisdiction of the Supreme Court even though it has no direct pecuniary or proprietary interest involved, but is in the position of a trustee, or as *parens patriae* or representative of a considerable portion of its citizens. And so it was held in *Missouri* v. *Illinois*,[50] which arose out of the construction, under the authority of the State of Illinois by the Sanitary District of Chicago, of a drainage canal by which sewage was emptied into and thus polluted the Mississippi River, which furnished the water supply to the inhabitants of Missouri. The Court said that "it would be objectionable, and, indeed, impossible, for the Court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this Court." [51]

Similarly, in *Kansas* v. *Colorado*,[52] the Court had under consideration the rights of States to the water of rivers flowing into and through their respective territories, and held that the conflict of interest was one justiciable by it. The Court said, speaking through Chief Justice Fuller, in reply to the argument that only those controversies are justiciable in the Supreme Court which prior to the Union would have been just cause for reprisal by the complaining State and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld:

"But when one of our States complains of the infliction of such wrong or the deprivation of such rights by another State, how shall the existence of cause of complaint be ascertained, and be accommodated, if well founded? The States of this Union cannot make war upon each other.

U. S. 359; Iowa *v.* Illinois, 147 U. S. 1; Virginia *v.* Tennessee, 158 U. S. 267; Missouri *v.* Nebraska, 196 U. S. 23; Louisiana *v.* Mississippi, 202 U. S. 1; Iowa *v.* Illinois, 202 U. S. 59; Washington *v.* Oregon, 211 U. S. 127; Maryland *v.* West Virginia, 217 U. S. 1. The cases of Virginia *v.* West Virginia, South Carolina *v.* Georgia and Virginia *v.* Tennessee arose out of compacts made between the States.

[49] Louisiana *v.* Texas, 176 U. S. 1.

[50] 180 U. S. 208.

[51] 180 U. S. 241.

[52] 185 U. S. 125.

They cannot 'grant letters of marque and reprisal.' They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties." [53]

When the case later came before the Court on its merits,[54] and with the United States as an intervenor, the Court reaffirmed its jurisdiction in the broadest possible terms. The intervening petition of the United States, however, was dismissed on the ground that Congress has no power to control the flow of water within the limits of a State except to preserve or improve navigability. On the question of jurisdiction the Court said:

"Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other Courts all the judicial power which the nation was capable of exercising was vested in those tribunals, and, unless there be some limitations expressed in the Constitution, it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto." [55]

4. *Suits by the United States Against a State*

There is no express grant by the Constitution of jurisdiction over suits brought by the United States against individual States, but such is necessarily implied, and such suits have been entertained by the Supreme Court.[56]

In the case of the *United States* v. *Texas*, which was brought to determine the boundary between Texas and the Territory of Oklahoma, Justice Harlan, rendering the opinion said:

"We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence

[53] Louisiana *v.* Texas, 176 U. S. 143. [54] 206 U. S. 46.

[55] 206 U. S. 83.

[56] See, for example, United States *v.* North Carolina, 136 U. S. 211; United States *v.* Texas, 143 U. S. 621; United States *v.* Michigan, 190 U. S. 379.

of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principals of law. . . . It would be difficult to suggest any reason why this Court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State." [57]

It is to be noted parenthetically that conversely, but only since 1902, it has been definitely decided that the Supreme Court will assume jurisdiction in suits by a State against the United States, when, of course, and only when the United States has consented to be sued.[58]

5. *Suit by a Foreign State or Subject against a State*

Although the Constitution provides for jurisdiction over controversies "between a State, . . . and foreign States, citizens, or subjects," such have never arisen. An Indian tribe is not a foreign State within the meaning of this clause of the Constitution.[59] So the question is still open, but both Madison and Story took the view that the Supreme Court would not entertain such a suit. A foreign State could not be compelled to appear as party defendant in such a suit, and therefore the question was, should it be permitted to appear as a party plaintiff unless the defendant State should give its consent.

"I do not conceive," said Madison, "that any controversy can ever be decided, in these Courts, between an American State and a foreign State, without the consent of the parties. If they consent, provision is here made." [60]

But the question is raised from the dictum of Justice Bradley, in *Hans* v. *Louisiana*, approving the dissenting opinion of Justice Iredell, in *Chisholm* v. *Georgia*, whether the Court would take jurisdiction even *with* the consent of the parties. Since, however, a State is presumed to have consented to be sued in the Supreme Court by a sister State, and by the United States, on what theory

[57] 143 U. S. 644–45.

[58] Minnesota *v.* Hitchcock, 185 U. S. 373. See also Oregon *v.* Hitchcock, 202 U. S. 60; Naganab *v.* Hitchcock, 202 U. S. 473, and Kansas *v.* U. S., 204 U. S. 331.

[59] Cherokee Nation *v.* Georgia, 5 Pet. 1.

[60] 3 ELLIOT, DEBATES, 2 ed., 533; STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1699. See also Marshall, C. J., in Foster *v.* Neilson, 2 Pet. 254, 307.

of Constitutional interpretation is it presumed to object to being sued in this Court by a foreign State, except on the theory that when a State has no reciprocal right to sue, it will not be presumed to place itself at a disadvantage?

It is interesting to note, parenthetically, that in the case of the *King of Spain* v. *Oliver*,[61] the Supreme Court expressly recognized the jurisdiction of the Federal Courts where foreign States are parties, refusing to inquire, however, upon a motion, whether Ferdinand VII, King of Spain, could institute the suit, the United States not having recognized him as King. The suit was in the nature of an action in *assumpsit* to recover duties imposed by the revenue laws of Spain, and subsequently failed on the merits.[62] The jurisdictional question was confirmed in the case of "The Sapphire." [63] This case arose out of a collision between the American ship *Sapphire* and the French transport *Euryale* in the harbor of San Francisco. A libel was filed in the name of Emperor Napoleon III, but before the case was argued the Emperor was deposed. In deciding that the Court had jurisdiction, Justice Bradley said:

"The first question raised is as to the right of the French Emperor to sue in our Courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third Circuit by Justice Washington and Judge Peters in 1810. The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and foreign States, citizens or subjects, without reference to the subject matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English Courts in cases growing out of the late Civil War. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into Court by suit." [64]

[61] 2 Wash. (C. C.) Rep. 429.

[62] Pet. Cir. Ct. Rep. 286, 290.

[63] 11 Wall. 164.

[64] 11 Wall. 167–168. See also Wisconsin *v.* Pelican Insurance Co., 127 U. S. 265; Colombia *v.* Cauca Co., 190 U. S. 524, 106 Fed. 337.

We have thus determined *when* the Supreme Court will take jurisdiction of a suit wherein a State is a party defendant. It is now necessary to consider the procedure leading up to a judgment.

THE PROCEDURE LEADING UP TO A JUDGMENT

From the decisions which have just been reviewed and from the other decisions incorporated by reference therein, it is possible at once to deduce the three following propositions as to the procedure to be adopted looking to a judgment against the defendant State:

First, if the defendant state does not appear, a subpoena will be issued against it for its appearance.[65]

Second, should the defendant state fail to appear, or should appear but ask that its appearance be withdrawn, the suit will proceed against it *ex parte*. But no coercive measures will be taken against it in relation to its appearance.[66]

Third, the procedure is that of a Court of Chancery, but such as is appropriate between individuals will be modified and accommodated to the dignity of the controversy.[67]

It, therefore, becomes necessary to determine next how the Court will enforce execution of the judgment rendered against the defendant State.

EXECUTION OF JUDGMENT

The issuance of execution on judgment is a normal feature of any ordinary suit at law, but where a judgment is sought against a State the question of Federal competency to execute it presents a more serious question. It is not possible to seize State funds or other property, except such as the State may hold in private proprietorship. The line between this and property exempt by reason of its devotion to public use is probably somewhere between such property as a State-aided railroad and a State public building. Moreover, a State, while not an independent sovereign, has attributes of sovereignty which will embarrass, if not bar the

[65] Chisholm *v.* Georgia, 2 Dall. 419; Graydon *v.* Virginia, 3 Dall. 320; New Jersey *v.* New York, 3 Pet. 461.

[66] New Jersey *v.* New York, 5 Pet. 284; Massachusetts *v.* Rhode Island, 12 Pet. 755.

[67] Rhode Island *v.* Massachusetts, 14 Pet. 210.

execution of a judgment that would attaint such attributes. Let us see how far the Supreme Court has gone.

WRIT OF MANDAMUS

The writ of mandamus, as has frequently been decided, is a proceeding ancillary to the judgment, and when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the judgment; and where the Court has decreed that a county or municipal body shall pay a debt it has never hesitated to issue a mandamus against the county or municipal officers to levy a tax to pay the debt, where the county or municipal body is vested with power to tax. But of course the fact that this remedy may be shown to be unavailing, does not confer upon a Court of equity the power itself to levy and collect taxes to pay the debt.[68]

Furthermore, it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety to issue a mandamus is to be determined.[69]

But when the mandamus was sought to be used to coerce *State* officials to perform an alleged duty, the Court found practical difficulty and embarrassment. The Court once ordered a state to release a prisoner condemned under a local statute, which it stigmatized as repugnant to the Constitution, laws and treaties of the United States. It was this order that provoked President Jackson to exclaim: "John Marshall has pronounced his judgment; let him enforce it if he can." [70] The situation grew out of the famous case of *Worcester* v. *Georgia,* decided in 1832,[71] in which an act of the State of Georgia was held void which attempted to exercise jurisdiction over Indian territory situated within the State's limits. The Supreme Court failed to secure the release of the plaintiff who had been imprisoned under this law, but this failure was due, not to any impotence on the part of the Federal

[68] Supervisors *v.* United States, 4 Wall. 435; Von Hoffman *v.* City of Quincy, 4 Wall. 535; City of Galena *v.* Amy, 5 Wall. 705; Riggs *v.* Johnson City, 6 Wall. 166; Walkley *v.* City of Muscatine, 6 Wall. 481; Rees *v.* Watertown, 19 Wall. 107; Heine *v.* Levee Commissioners, 19 Wall. 655; Meriwether *v.* Garrett, 102 U. S. 472; Labette County Commissioners *v.* Moulton, 112 U. S. 217.

[69] Marbury *v.* Madison, 1 Cranch 137; Kendall *v.* United States, 12 Pet. 524.

[70] 1 BRYCE, AMERICAN COMMONWEALTH, new ed. (1911), 269.

[71] 6 Pet. 519.

judiciary, but to the refusal of the President to lend his executive aid. From 1835 to the outbreak of the Civil War there can be no doubt but that the Supreme Court exerted a much less potent influence on solidifying and expanding the Federal power than it had exercised in the preceding thirty-five years. During the two terms of Jackson as President, five vacancies occurred in the Supreme Court, among them the Chief Justiceship, to which Taney was appointed in 1835. The effect of the new appointment upon the views of the Court was shown almost immediately. There was a very decided leaning away from the expansion of Federal power, and towards the expansion of State power. This, indeed, is the only plausible, albeit not a sound explanation of the startling decision in *Kentucky* v. *Dennison*.[72] The facts were that a certain freeman was indicted by the grand jury of Woodford County, Kentucky, of the crime, under the laws of Kentucky, of seducing and assisting a certain slave to escape from her owner into Ohio. Demand was thereupon made by the Governor of Kentucky upon the Governor of Ohio for the return of the slave under the provision of the Constitution, which recites that "A person charged in any State with treason, felony or other crime who shall flee from Justice, and be found in another State, *shall*, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime," [73] and the enabling act of February 12, 1793, making it "the duty of the Executive Authority of the State or Territory to which such person shall have fled" to surrender him.[74] But the Governor of Ohio refused to do so, maintaining, among other grounds, that the jurisdiction conferred by the Constitution was limited to such acts as constituted either treason or felony by the common law, or were generally regarded as crimes when the Constitution was adopted, and second, that the Federal Judiciary had no power of coercion over a State executive. Chief Justice Taney, in delivering the opinion of the Court, overruled the first of these contentions, but sustained the second, and said:

"Looking to the subject matter of this law and the relations which the United States and the several States bear to each other, the Court

[72] 24 How. 66.

[73] Art. IV, § 2. (Italics inserted.)

[74] Ch. 7, § 1, 1 STAT. 302, REV. STAT., § 5278.

is of opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with the power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

"It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. . . . And it would seem that when the Constitution was framed and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this Constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty.'

"But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him." [75]

To this decision — we can scarcely call it reasoning, for it is totally unconvincing as a piece of Constitutional interpretation — no dissent was recorded, and it was approved in a *dictum* in *Taylor* v. *Taintor*,[76] a case arising also under Article 4, Section 2, of the Federal Constitution, but upon a different state of facts.

In 1879, in the case of *Ex parte* Virginia,[77] the Court, speaking through Mr. Justice Strong, denied a writ of habeas corpus to a county judge of the State of Virginia on the ground that in the

[75] 24 How. 107–110. [76] 16 Wall. 366. [77] 100 U. S. 339.

selection of jurors he discriminated against negroes in violation of the Federal Statute [78] enacted pursuant to the Thirteenth and Fourteenth Amendments. In speaking of the Dennison Case the Court said:

"The act in that case provided no means to compel the execution of the duty required by it, and the Constitution gave none. It was of such an act Mr. Chief Justice Taney said, that a power vested in the United States to inflict any punishment for neglect or refusal to perform the duty required by the Act of Congress, 'would place every State under the control and dominion of the General Government even in the administration of its internal concerns and reserved rights.' But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete. The remarks made in *Kentucky* v. *Dennison* and in *Collector* v. *Day*, though entirely just as applied to the cases in which they were made, are inapplicable to the case we now have in hand." [79]

Here would seem to be a distinction without merit, based upon the fact that the Thirteenth and Fourteenth Amendments expressly give Congress power to enforce their provisions "by appropriate legislation." But what further power can be granted than that which the Constitution itself gives in Article 4, Section 2, when it says that it *shall* be the duty of the governors of the States to carry out the provision of the Constitution in question? Are we, in short, to give greater effect to an Act of Congress than to the mandatory words of the Constitution itself? Is it not just as reasonable to suppose that the framers of our Constitution did not contemplate any defiance of the direct mandate of the words of the Constitution, as it is to suppose that because of the character of the difficulties feared in the enforcement of the new amendments, following the Civil War, penal provisions were desirable? And so it would seem from the history of the Debates in the Constitutional and State Conventions. Indeed, Charles Pinckney, in his explanations of the new government, said of this part of the Fourth Article of the Constitution that it "is formed exactly upon the principles of the Fourth Article of the present

[78] 18 STAT. Pt. III, 336.

[79] 100 U. S. 347, 348. Mr. Justice Field and Mr. Justice Clifford dissented.

Confederation, except with this difference, that the demand of the Executive of a State, for any fugitive criminal offender, *shall* be complied with." [80] But apart from any historical aspect, the very words of the Constitution are capable of but one construction. Chief Justice Taney himself declared, in his opinion, that "it has been the established doctrine . . . ever since the Act of 1789, that in all cases where original jurisdiction is given by the Constitution this Court has authority to exercise it without any further Act of Congress to regulate its process or confer jurisdiction." [81] Furthermore, the Supreme Court, only a few years later (although Chief Justice Taney had died) held, in a series of cases already referred to, that where power is given by statute to public officers, in permissive language, such as they "*may*, if deemed advisable," — do a certain thing — such language will be regarded as peremptory, when the public interest or individual rights require that it should be.[82]

In *Ex parte* Siebold,[83] the Court rendered a similar decision at the same term, denying a writ of habeas corpus to certain judges of election in Baltimore, alleged to have interfered with Congressional elections. There the Court said through Mr. Justice Bradley, in relation to the Dennison Case:

"There, Congress had imposed a duty upon the Governor of the State which it had no authority to impose. The enforcement of the clause in the Constitution requiring the delivery of fugitives from service was held to belong to the government of the United States, to be effected by its own agents; and Congress had no authority to require the Governor of a State to execute this duty." [84]

Certainly belabored reasoning. Just what is meant by "the government of the United States" and "its own agents" is difficult to imagine, if it does not include *the judicial power* of the government. Mr. Justice Field and Mr. Justice Clifford again dissented.[85]

Such is the extent to which the Dennison Case has been referred

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[80] 3 FARRAND, 112. (Italics inserted.)

[81] 24 How. 98.

[82] Supervisors *v.* United States, 4 Wall. 435; Von Hoffman *v.* City of Quincy, 4 Wall. 535; City of Galena *v.* Amy, 5 Wall. 705.

[83] 100 U. S. 371.

[84] 100 U. S. 391.

[85] See also *Ex parte* Clarke, 100 U. S. 399; United States *v.* Gale, 109 U. S. 65.

by the Supreme Court in relation to a State's refusal to discharge its duty. Irreconcilable as it is with the undoubted power by very grant of the Constitution, it is still authority, until overruled, for the principle that the Supreme Court will decline to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political department of their governments. And yet the Supreme Court, within the last three years, has cited this case in declaring that "there is no discretion allowed, no inquiry into motives," under Article 4, Section 2 of the Constitution.[86]

What conclusions, then, can we draw from a review of the decisions which persist in such an unintelligent use of the Dennison case? Can we draw any definite line between enforcible and non-enforcible state duties? It would seem not, except to the following extent: Generally speaking, the complainant in a suit against a State asks for relief in one of the three following ways:

First, through the action of complainant. This relief the Supreme Court is undoubtedly competent to authorize; as for example, should a state prove its claim to land held by another state, a judgment will entitle it to take possession. This is nothing more than the situation typical in the various boundary disputes heretofore discussed.

Second, through the cessation of acts within the jurisdiction of the different States, as for example, such relief as was requested and granted in *Kansas* v. *Colorado*.[87]

Third, and lastly, through *the performance of some act by the defendant State*, such as, for example, was sought in the Dennison case, but denied, when it came to the point of coercion, although as we have seen the Court has never hesitated:

(*a*) To mandamus county or municipal officials, vested with the power of taxation, to levy a tax, or

(*b*) To compel by imprisonment subordinate State officials, such as county judges and judges of elections, to obey the Federal penal laws, enacted pursuant to the Constitution.

Suppose that the act in question to be performed by the defendant State be the payment of money?

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[86] Drew *v.* Thaw, 235 U. S. 432, 439.

[87] 185 U. S. 125; 206 U. S. 46.

It is recorded that Edmund Randolph, in pleading for judgment for Chisholm against the State of Georgia, exclaimed: "What if the State is resolved to oppose the execution? This would be an awful question indeed! He to whose lot it should fall to solve it, would be impelled to invoke the god of wisdom to illuminate his decision." [88]

And, as has already been pointed out, Hamilton himself, not accustomed to magnify the position of the States, said it would be of no purpose to authorize suits against States for the debts they owe because recoveries could not be enforced without waging war against the contracting States.[89]

Similarly spoke Daniel Webster:

"It has been said that the State cannot be sued on these (State) bonds. But neither could the United States be sued, nor, as I suppose, the Crown of England in a like case. Nor would the power of suing give to the creditors, probably, any substantial additional security. The solemn obligation of a government arising on its own acknowledged bond, would not be enhanced by a judgment rendered on such bond. If it either could not, or would not make provision for paying the bond, it is not probable that it could or would make provision for satisfying the judgment." [90]

As opposed to these views, however, in the early cases of *Chisholm* v. *Georgia*,[91] *United States* v. *North Carolina*,[92] and *United States* v. *Michigan*,[93] already referred to, the Court sustained jurisdiction over actions to recover money from a State, albeit the question of execution did not arise. And later, in the case of *Louisiana* v. *Jumel*,[94] in an action on certain State bonds, the Court used this unmistakable language relative to its *complete* power, although it is true that on the given facts, the Court refused to permit the bondholders by a writ of mandamus to collect the debt due by the State, because they could not themselves have obtained judgment against the State in an action on the bonds:

"When a State submits itself, without reservation, to the jurisdiction of a Court in a particular case, that jurisdiction may be used to give *full effect* to what the State has by its act of submission allowed to be

[88] 2 Dall. 437. [89] THE FEDERALIST, No. 81.
[90] WEBSTER'S WORKS, vol. vi, 539 — opinion given to Baring Brothers.
[91] 2 Dall. 419.
[92] 136 U. S. 211. [93] 190 U. S. 379. [94] 107 U. S. 711.

done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such *coercion* may be employed for that purpose." [95]

Finally, in 1904, the Court, though divided five to four, affirmed vigorously its ability to enforce pecuniary claims against a State in the case of *South Dakota* v. *North Carolina*,[96] also previously referred to. There South Dakota sued as owner of certain bonds of the State of North Carolina issued in aid of the construction of two railroad companies. The Court said, speaking through Mr. Justice Brewer:

"We have, then, on the one hand, the general language of the Constitution vesting jurisdiction in this Court over 'controversies between two or more States,' the history of that jurisdictional clause in the Convention, the case of *Chisholm* v. *Georgia*, *United States* v. *North Carolina*, and *United States* v. *Michigan* (in which this Court, sustained jurisdiction over actions to recover money from a State), the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expression of individual opinions of justices of this Court, the difficulty of enforcing a judgment for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a Court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties.

"There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff's claim. If that should be the result there would be no necessity for a personal judgment against the State." [97]

And so it developed that there was no such necessity, because with a change of State administration at the next election, the State of South Dakota did not press the claims.

This highly important decision presents a most interesting study in itself. Its soundness is not above criticism, for the splendid reasoning in Justice White's dissent, in which the Chief Justice

[95] 107 U. S. 728. (Italics inserted.)

[96] 192 U. S. 286.

[97] 192 U. S. 320–21.

(Fuller) and Justices Day and McKenna concurred, would seem to be more consonant with the fundamental theory of the Constitution and the Court's prior decisions.[98] But space does not permit of a detailed analysis, nor would such be pertinent to the immediate subject in hand.

VIRGINIA *VERSUS* WEST VIRGINIA

But suppose it is otherwise? Suppose the defendant State refuses to pay, pursuant to a decree entered by the Supreme Court against it in favor of another State, will the Court *actually compel* payment?

This is the concrete question presented in the long drawn out litigation between the States of Virginia and West Virginia, which commenced in 1870, and is still before the Supreme Court — the present and last proceeding, as yet undecided, in which the State of Virginia has asked for a writ of mandamus against the Legislature of West Virginia, compelling it to raise the money sufficient to pay the twelve million odd dollars which the Supreme Court has decreed West Virginia must pay, making the ninth time that this famous controversy has been before the Supreme Court in one form or another.

Let us review briefly the history of this case.

As the Court has said, the grounds of the claim are matters of public history. After the Virginia ordinance of secession, adopted at Richmond in February, 1861, citizens of the northwestern part of the State who were separated from the eastern part by a succession of mountain ranges and who were opposed to secession, dissented from that ordinance and organized a government that was recognized as the State of Virginia by the Government of the United States. Forthwith a convention of the "restored" State held at Wheeling, proceeded to carry out a long entertained wish of many West Virginians by adopting an ordinance for the formation of a new State, "the so-called Piedmont Government," out of the western portion of the old Commonwealth. A part of Section 9 of the ordinance was as follows:

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January,

[98] See the cases collected in a note to this dissent, 192 U. S. 331.

1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the said period."

The ordinance also provided for a popular vote, a constitutional convention, etc., and ordained that when the general assembly should give its consent to the formation of such new State, it should forward to Congress such consent, with the request for admission into the Union. A constitution was framed for the new State by a constitutional convention, as provided in the ordinance, November 26, 1861, and was adopted. By Article 8, Section 8

"an equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accrued interest, and redeem the principal within thirty-four years."

An Act of the Legislature of the restored State of Virginia, passed May 13, 1862, gave the consent of that legislature to the erection of the new State, "under the provisions set forth in the Constitution for the said State of West Virginia." Finally Congress gave its sanction by an Act of December 31, 1862,[99] which recited the framing and adoption of the West Virginia Constitution and the consent given by the legislature of Virginia through the last mentioned act, as well as the request of the West Virginia Convention and of the Virginia legislature, as the grounds for its consent. There was a provision for the adoption of an emancipation clause before the Act of Congress should take effect and for a proclamation by the President, stating the fact, when the desired amendment was made. Accordingly, after the amendment and a proclamation by President Lincoln, West Virginia became a State on June 20, 1863.

Then a controversy as to the boundary line between the two States arose, and more particularly whether certain counties

[99] Ch. 6, 12 STAT. 633.

were properly to be included in the new State of West Virginia. So in 1870 the matter came before the Supreme Court to be decided on original bill, and in an opinion by Mr. Justice Miller, from which, however, Justices Davis, Clifford and Field dissented, the Court affirmed its original jurisdiction over boundary controversies between States and held that the course of action, just enumerated, taken by the new and the old State constituted an agreement between them that was binding.[100] Reverdy Johnson was of counsel for West Virginia. This decision has already been cited in connection with the general question of jurisdiction over boundary disputes.

From this time up until the year 1905, various efforts were made by Virginia, through her constituted authorities, to effect an adjustment and settlement with West Virginia for an equitable portion of the public debt of the undivided State, proper to be borne and paid by West Virginia, but all these efforts proved unavailing, and it was charged that West Virginia refused or failed to take any action or do anything for the purpose of bringing about a settlement or adjustment with Virginia. Therefore, in February, 1906, Virginia invoked the original jurisdiction of the Supreme Court to procure a decree for an accounting. A demurrer by West Virginia to the bill was overruled in March, 1907, the Court deciding practically what had been decided in 1870 (without prejudice, however, to any question) in an opinion delivered by Chief Justice Fuller.[101] After an answer had been filed, the cause was directed to be referred to a master (March 4, 1908).[102] Mr. Charles E. Littlefield was appointed Master on June 1, 1908. Testimony was taken between November 16, 1908, and July 2, 1909. The case was argued before the Master in November and December, 1909. His report was filed March 17, 1910.

On March 6, 1911,[103] the Court fixed West Virginia's share of the principal debt at $7,182,507.46. The total amount of the debt which was to be apportioned was $33,897,073.82, represented mainly by interest-bearing bonds. Just how the proportion to be borne by West Virginia was arrived at is beside our present discussion. Suffice it to say that the Court adopted a ratio deter-

[100] 11 Wall. 39.
[101] 206 U. S. 290.
[102] 209 U. S. 514.
[103] 220 U. S. 1.

mined by the Master's estimated valuation of the real and personal property of the two States on the date of separation, June 20, 1863.

The question of interest and the adjustment of any clerical errors was left open. In closing its opinion the Court said, speaking through Mr. Justice Holmes:

"As this is no ordinary commercial suit, but, as we have said, a *quasi* international difference referred to this Court in reliance upon the honor and constitutional obligations of the States concerned, rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference between the parties which, whatever the outcome, must take place. If the cause should be presented contentiously to the end, it would be referred to a Master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. *But this case is one that calls for forbearance on both sides.* Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end." [104]

However, efforts on the part of the Virginia Debt Commission to reach an agreement in conference with West Virginia failed, and on October 9, 1911, Virginia moved to proceed with the cause, but on objection of West Virginia, the Court denied the application, saying:

"A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace." [105]

On October 13, 1913, Virginia again moved to proceed with the cause, her motion being virtually a reiteration of her former motion and was based upon the ground that certain negotiations which had taken place between the Virginia Debt Commission and

[104] 220 U. S. 36. (Italics inserted.)

[105] 222 U. S. 17, 20–21.

a Commission representing West Virginia, indicated that no hope of an adjustment out of Court existed. But West Virginia denied this, and asked for six months' extension for the purpose of having its Commission complete its labors and agree upon a basis of settlement with the Virginia Commission. Whereupon the Court again yielded to West Virginia and said through the Chief Justice:

"Having regard to these representations (of West Virginia) we think we ought not to grant the motion to proceed at once to consider and determine the cause, but should, as near as we can do so, consistently with justice, comply with the request made for further time to enable the Commissioners of West Virginia to complete the work which we are assured they are now engaged in performing for the purpose of effecting a settlement of the controversy. As, however, the granting of six months delay would necessitate carrying the case possibly over to the next term, and therefore be in all probability an extension of time of more than a year, we shall reduce somewhat the time asked and direct that the case be assigned for final hearing on the thirteenth day of April next, at the head of the call for that day." [106]

When that day came, West Virginia prayed leave to be permitted to file a supplemental answer asserting the existence of certain credits, heretofore alleged not to have been properly considered, and asserting various grounds why interest should not be allowed against West Virginia on the sum due. Without passing on the merits of these contentions, the Court nevertheless granted the motion of West Virginia, and referred the subject matter of the supplemental answer to the same Master, with directions to report at the commencement of the next term of Court. In closing its opinion, the Court said (White, C. J.):

"As we have pointed out, in acting in this case from first to last, the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between States involving grave questions of public law determinable by this Court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed had been controlled. And we are of the opinion that this guiding principle should not now be lost sight of to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must in the absence of agreement between the

[106] 231 U. S. 89, 91.

parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving State, also in our opinion operates no injustice to the opposing State, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy." [107]

A great mass of testimony was taken under this reference to the Master, which ended in his filing his final report; exceptions were argued and a decision rendered, on June 14, 1915,[108] whereby the following sums were allowed to Virginia, and a decree entered accordingly:

Principal	$4,215,622.28
Interest	8,178,307.22
Total	$12,393,929.50

with interest thereon from July 1, 1915, until paid, at the rate of 5 per cent per annum, costs to be equally divided between the two States.

The State of Virginia, acting through its Commission, endeavored to obtain an amicable payment of the money, or some arrangement for payment which would be mutually satisfactory. These efforts brought about nothing in the way of a payment or agreement to pay, or arrangement for payment. Therefore, Virginia filed a motion for leave to issue an execution. But this was denied,[109] West Virginia having filed an answer setting forth:

1. That she had no power to pay such a judgment except through the legislative department of her government, and she should be allowed to wait until January, 1917, when her legislature would next meet in regular session.

2. That presumptively she had no property subject to execution, and

3. That the Court had no authority whatever to enforce a money judgment against a State, although in the exercise of jurisdiction such a judgment had been entered.

[107] 234 U. S. 117, 121. [108] 238 U. S. 202. [109] 241 U. S. 531.

The Court said:

"Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time. The prayer for the issue of a writ of execution is therefore denied, without prejudice to the renewal of the same after the next session of the Legislature of the State of West Virginia has met and had a reasonable opportunity to provide for the payment of the judgment." [110]

The day for the biennial convening of the West Virginia Legislature was January 10, 1917. So, instead of renewing her prayer for a writ of execution, Virginia moved for leave to file a petition for a writ of mandamus, commanding the West Virginia Legislature to levy a tax wherewith to liquidate the decree, and the motion was granted February 5, 1917.

That motion was made only after the legislature, though it had been in session for some considerable time and was approaching its time for adjournment, had done nothing in the way of providing for the liquidation of the indebtedness. None of the recommendations of the Governor to the legislature, looked to the payment of the debt.

A resolution by the Senate of West Virginia, in which the House of Delegates concurred, was enacted on the twenty-first day of February, 1917, in these words:

"First. — That the Attorney General of the State, with the assistance of special counsel retained by the New Virginia Debt Commission for the purpose, be authorized and directed to appear to and make appropriate defense against said rule for and on behalf of the State of West Virginia, the Legislature thereof, and the several senators and delegates constituting the membership of its respective bodies.

"Second. — That in the event the Legislature should not be in session at the time of the rendition of the Court's judgment upon the mandamus, the Governor is requested, whether that judgment be for or against the State of West Virginia, to convene the Legislature in special session as soon as may be, for the purpose of doing without delay what should be done in the premises."

In the answer on behalf of the Legislature of West Virginia was embodied a motion to quash the rule which had been awarded against the defendants herein to show cause why a writ of man-

[110] 241 U. S. 532.

damus should not be issued. This motion rests upon an assertion in effect that (1) the Court has no power to compel the legislature to levy a tax for the purpose of liquidating said decree; that (2) the Court has no power to enforce the judgment by it rendered; and that (3) the issuance of a writ of mandamus would be contrary to the principles and usages of law.

No fact was averred in the motion which had not been the subject of consideration by the Court antecedently to its entry of its final decree, excepting an averment that on the first of March, 1784, a deed to Congress, ceding all the territory of Virginia northwestward of the Ohio River in the United States, had been delivered upon the following conditions:

"That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to, any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American Army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

It was not averred that any claim of this nature had been presented to the State of Virginia antecedently to the entry of the final decree, nor that any money on account thereof had ever been received, or would be received by the State of Virginia; but it was asserted that "Congress seems to have donated many of these lands and much of the proceeds thereof to purely local purposes not contemplated by the deed of cession, but actually contrary to its terms;" and that a large sum was due and payable from the Government of the United States to the State of Virginia "in which West Virginia should share in the same ratio that she is compelled to contribute to the payment of Virginia's debt, that is to say, she should receive 23½ per cent thereof." The claim is stated to be "based upon information and belief," and whether or not it amounts to more than another dilatory plea on the part of West Virginia, is entirely apart from the subject here under consideration, and therefore will not be analyzed.

In view of the answer of West Virginia, which stated that it

had no property subject to execution, and of its claim that the Court cannot bring about a payment of its decree by the issuance of writ of mandamus or of any other process, the record as it now stands, awaiting the decision of the Supreme Court, presents this question:

"If, as the result of a controversy between two States, a decree is entered by the Supreme Court against one, in favor of the other, is the Court unable, despite the pecuniary ability of the debtor, to compel payment?"

From the study which we have just made of the Federal Judicial Power under the Constitution and the decisions of the Supreme Court construing this power, there can be no doubt as to how this question must be answered. It must be answered in the negative. The Court has proceeded thus far because judicial power so to do has been expressly vested in it by the Constitution. It was necessary for it to enter its decree in favor of the plaintiff or of the defendant State. The decree which was entered was in performance by the Court of a duty imposed upon it. The matter of compelling a State to do its duty is a judicial one. As such it was expressly conferred upon the Court. The duty of the State of West Virginia is to liquidate the decree. It can do this by the exercise, through its Legislature, of its power to levy a tax, or to create a bonded indebtedness. The exercise of this power, so far as regards the Court and its decree, is a duty, and it is fundamental to distinguish between a discretion to do or not to do a particular act, with no compulsion to do one thing or the other, and a discretion to do one of two things, with a duty to select. The remedy by which the duty can be compelled to be performed is an ordinary judicial remedy. The sum and substance of West Virginia's attempts to refute this fundamental principle of the law is that the same final writs lie against States that lie against individuals, and they may fail of their object in the one case as well as in the other, but in each the limit of judicial power is the same. West Virginia asserts that the soundness of this contention is borne out by the fact that no decision has done more than effectuate — not invade or coerce — the legislative will.

"Parliamentary duties," she declares, "have never been interfered with by the judicial department of the government of any English

speaking people; and, although our dual government presents a peculiar situation, yet we are a people with a written Constitution, and the duality of that government has been hedged about by express provisions. A State that seeks a judgment against another and the enforcement thereof must not only keep within the terms of the Constitution, but must keep as well within the theory of our government, and any writ that destroys the integrity of the States is just as much *anathema* as any failure of the writ would be the other way. The whole world is in a state of ferment, and the only people therein who have any hope at all are those who have a written Constitution, lived up to. Implications are not well understood by common folks, and the stretch of the letter by implication, to the end that delegated power may swell its bounds beyond the rights reserved, would, we fear, be not only violative of the letter, but destructive of the spirit, and disastrous in the end." [111]

There is, of course, in a sense, a distinction between enforcing a decree against a State for the payment of money, and one for the performance of an act of such other nature, the coercion of which might be said to attaint the sovereignty of the State. But even this distinction is political, not legal, and in spite of all that has been said to the contrary on behalf of West Virginia, there is no judicial precedent except the Dennison Case, which controverts the supreme power of our highest Court to *enforce* obedience to its order in the present situation. As has been demonstrated, Chief Justice Taney's reasoning in the Dennison Case is also political, not legal, and therefore it is believed that should the Supreme Court allow it to control in the Virginia-West Virginia controversy, if West Virginia persists longer in her resistance, such admission of impotence would be not merely unreasonable and unfortunate from a practical point of view, but unwarranted under the Constitution. The cloak of judicial immunity would be cast upon a State's repudiation of its debts.

William C. Coleman.

[111] Reply Brief of West Virginia, March 23, 1917, 6–7.